

Badal Samser Ali Vs. State

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Court : Guwahati

Decided On : Mar-06-1952

Judge : Thadani, C.J. and Ram Labhaya, J.

Appellant : Badal Samser Ali

Respondent : State

Judgement :

Ram Labhaya, J.

1. Badal, appellant and Chand Mea, his co-accused were committed for trial to the Court of Sessions Judge, U.A. Dts., under Section 395, I.P.C. Chand Mea was unanimously found guilty under Section 395 by the Jury. He was convicted for that offence and sentenced to R.I. for 3 years. He has not appealed. The Jury unanimously found Badal guilty also under Section 412, I.P.C. He was convicted and sentenced to R.I. for 3 years. He has appealed.

2. The case for the appellant as put before us is that mis-directions and non-directions bearing on the essential ingredients of the offence (Section 412) contained in the charge to the Jury have deprived the accused of the substance of a fair trial and the protection of law though it is not contended that the evidence did not disclose the case of a dacoity or that property was not stolen from the shop of the complainant Onkarmal.

3. On the night following the 27th December, 1949 the shop house of Onkarmal Sarmah was the scene of a dacoity, about the commission of which there is no dispute at this stage. Onkarmal lived in the shop house with his wife, two small children and his servant. The shop house was broken open. 3 or 4 persons first entered the shop with 'doas' in their hands. Onkarmal and his wife were asked to hand over the keys of their boxes and to disclose where their valuables were. It was further alleged that no less than 10 or 12 persons in all entered the shop house and remained inside for 2 hours and succeeded in removing a considerable quantity of valuable articles including ornaments, cash and clothing.

After that both Onkarmal, his wife and servant were left tied down. A bag of paddy was placed at the feet of Onkarmal who succeeded in disentangling himself sometime after the dacoits had left. He then raised the alarm which attracted his neighbours. The occurrence was reported at the Police Station at about 10 a.m. on 28th December, 1949 by Onkarmal himself. He claimed in his report to have identified two persons other than Badal and gave a list of the stolen property. The first item in the list of stolen property was a Raleigh Cycle. Items No. 2 to 10 are articles of jewellery. Item No. 11 was about currency notes and cash. The next three items which are important for the purposes of the case were described as follows:

No. 12. 'Three 'marking thans', two of them bearing the number 3840 and the number of the rest cannot be said. Rs. 77/-

No. 13. Two fine bed-sheets (Bombay) measuring 6 3 cubits each

Rs. 15/-

No. 14. Dhotis and Saris (number cannot be stated from memory) about Rs. 500/-.

It was stated further that the stolen pieces of cloth had marks on them in his own hand and he would be able to identify the stolen property if shown to him.

4. The only prosecution witnesses who are said to have identified the property recovered from the shop house of Badal are Onkarmal P.W. 1 and his wife. The important witness is Onkarmal himself. His wife has identified only a piece of a

saree border. According to Onkarmall's statements in the Committing Magistrate's Court (with the relevant part of which he was confronted at the trial and which was tendered in evidence by defence under Section 288, Cr.P.C.) he accompanied the Police first to Samuliguri 'hat' in search of the stolen property. The house of Chand Mea was then searched and after that he was taken to Badal's house which was also searched in his presence.

The Police recovered from the house where Badal lived Ex. 1 a brand new black bordered saree. Ex. II 18 pieces of brand Dhoties (with Chulipari), Ex. III three new 'ganjies'. Ex. IV two new striped shirts, Ex. V two pieces of new bed sheets, Ex. VI a piece of striped shirting 8 yds. The two bed-sheets (Ex. V) were found spread over the compound fencing. Exs. VIII to XI are unidentified articles. Ex. XII was the silver border of a saree 3 or 4 yds. in length. (His Lordship referred to the evidence in the case and proceeded:

5-9. The evidence bearing on the guilt or innocence of Badal, appellant, under Section 412 has all been reproduced above. The questions that arise in the case are as follows:

1. Whether the property, recovered was stolen property.
2. Whether Badal was in possession of it.
3. Whether he knew of had reason to believe that its possession had been transferred by the commission of the dacoity or
4. Whether he dishonestly received it from a person whom he knew or had reason to believe to belong or to have belonged to a gang of dacoits, knowing or having reason to believe that it was stolen.

10. The learned Advocate for the appellant has urged that the charge on all the necessary ingredients of the offence is incomplete, inadequate and defective and that there is a glaring mis-direction particularly on questions No. 3 and 4 above. The first question is whether the property recovered from the house where Badal lived was stolen from the house of the complainant and that it had been identified by him. On this point the learned Judge observed in the charge as follows:

He (Onkarmall) identified the property recovered from the accused Badal's place and he has shown in this Court - the Nagri writings on them which he claims to be his. He has further put down some figures in the paper marked 'P' and it is before you to compare, if you like, the writings in the paper with the figures traceable in the new clothes that have been recovered by the police and seized under seizure list (Exh. 2). It was also brought to the notice of the Jury that he identified the 'pati' claimed by his wife, a piece of border brocade, that was in his box where other articles with clothes and ornaments were kept.

As regards the two conflicting statements of the complainant about the mark O.S. appearing on one of the gunny bags, the learned Judge summed up the position in the following terms:

You can see from the evidence as recorded in the Court below that the word 'Satyanarayan' was already written by the Magistrate but that has been penned through and the word 'Sarma' is written above it. You may, therefore, consider whether the witness had changed the version or that there was a 'bona fide' error on the part of the learned Magistrate in writing the word 'Sarma' in place of 'Satyanarayan'.

When summarising the evidence against Badal, the learned Judge further told the Jury that there is little or no support as to the identity of the majority of the articles except the trifling article the piece of border with silver-thread (Exh. III). It is clear to us that all the facts bearing on the question of identification, of what was alleged to be stolen property was not placed before the Jury. The Jurors were not informed that out of the articles marked Exs. I to VI identified by the complainant in the committing Magistrate's Court the pair of brand new black bordered Saree Exh. I, 3 new 'ganjees', Exh. (III), 2 new striped shirts (Exh. IV) a piece of striped shirting 8 yards, Exh. (VI) were not mentioned in the list of the stolen property. The markins thus mentioned at No. 12 of the list of the stolen property were not recovered.

The important question that arises is whether two fine bed sheets measuring 6 3 and the dhotis and the sarees which were mentioned in the list of stolen property were recovered from the house of Badal. On this point, the important fact which

had to be placed before the Jury was that at both the stages that is when the seizure list was prepared and in the committing Magistrate's Court no reference was made to any mark or writings on any of these articles in the hand of Onkarmall. Complainant's explanation that his attention was not drawn to this fact had also to be placed before the Jury in order that they could consider what value to place on it.

At the trial he deposed that 15 pieces of unwashed dhotis bore pencil marks on them in his hand. He also stated that shirts (Exh. X) bore price mark in ink. A piece of bed sheets was also said to have a mark on it. It does not appear whether the mark was in pencil, or ink. Apart from the gunny bag these are the only articles on which marks were alleged to exist. The pencil marks do not appear to have been noted when the seizure lists were, prepared. The gunny bags with his firm name were not stated to have been stolen. These facts have a very important bearing on the question of the identity of the property alleged to have been stolen and they were not placed before the Jury.

11. As to whether property recovered from the house where Badal was residing was in his possession or not we have an admitted fact that it was recovered from the house in which he was residing with others. His father was admittedly a co-accused with him. The accused has stated that other members of his family, his brother and uncle and even his mother were arrested in connection with this case. These facts were not brought to the notice of the Jury. Two statements of the accused one made before the committing Magistrate and the other at the trial were referred to and the learned Judge's comment was as follows:

You must first be satisfied with the Identity of the articles before committing him under Section 395 or 412, I.P.C., if of course you think that he consciously possessed these articles and had kept them or retained them in his possession and control either exclusively or with the connivance of his father.

There was no evidence in the case that Badal received the goods knowing or having reason to believe that they were stolen or was there any evidence to show that he received property recovered from his house dishonestly. Articles were recovered from the house where he and his father lived. His father was not only

arrested but he was charge-sheeted and proceeded against as a co-accused with Badal. He, was discharged. Badal also stated that other members of his family, brother and uncle were also arrested. These facts were not stated in the charge.

After the release and discharge of other members of his family, the prosecution case was reduced more or less to exclusive possession by him. Receipt by him could have led to this result. But there was no evidence about his receiving the things recovered. A full statement of all these facts was necessary to enable the Jury to come to a reasonable finding as to whether he could be treated as in possession of the property recovered from the house exclusively. The learned Judge no doubt placed the two statements of the accused before the Jury but left the matter at hat. Facts left unstated had an important bearing on the question.

12. In the absence of any direct evidence about the complicity of Badal in the dacoity and also about his receiving or retaining the property recovered with the knowledge or the belief specified in Section 412, the question of his guilt or innocence under Section 412 depended mainly on the presumption that may have been made against him under Section 114 of the Evidence Act. On this point the charge is lacking both in accuracy and completeness. The learned Judge while explaining the law on the point stated as follows:

Section 114 of the Indian Evidence Act with illustration (a) explained to the Jury. It is a rule of evidence that a man who is in possession of stolen goods soon after the theft, is either a thief or has received the goods knowing them to be stolen unless he can account for his possession. In this case if you believe that the articles recovered from the house of Badal - if even some of them are identified to your satisfaction to be properties stolen or removed from the house of Onkarmall during the dacoity and that they were recovered on the day following the occurrence - it may be presumed, if you believe that Badal possessed them - that he is either a thief or a dacoit or that he retained these articles knowing them to be stolen or removed in course of a dacoity. (Sections 411, 412 I.P.C. placed before the Jury and explained).

Further,

if you believe that the identification of these things are complete, you might suppose that Badal was one of the dacoits or that he received from the dacoits - very little time having elapsed between the occurrence and the recovery of these articles from his possession.

Further on in the charge, the learned Judge stated that

'Section 412, I.P.C. deals with receiving or retaining in possession stolen property, the possession whereof is likely to have been transferred by the commission of a dacoity and here if you think that accused Badal retained possession of them dishonestly and was not likely to be present in the dacoity, then of course, the finding against him should be one under Section 412, I.P.C., in case you find that he consciously possessed these steles and had them in his control.

13. Assuming that all or some of the things were stolen and were also in possession of Badal, illustration (a) of Section 114 of the Evidence Act, would permit the Court or the Jury to presume when the recovery of the property was made soon after the theft that he was either a thief or had received goods knowing them to be stolen unless he could account for his possession. The presumption is one of fact and whether the Court or the Jury ought to draw it or not must depend on the circumstances, of each case, vide *Nga Toke Hla v. Emperor* AIR 1937 Rang 439. But it is noteworthy that onus on the prosecution to prove the guilt does not change. The direction of Lord Reading to the Jury in the leading case of *R. v. Schama* (1914) 11 Cr App Rep 45, reproduces lucidly the law on the point. It is as follows:

Where the prisoner is charged with having recent stolen property, when the prosecution has proved the possession by the prisoner and that the goods had been recently stolen, the Jury may be told that they may, not that they must, in the absence of any reasonable explanation find the prisoner guilty, But if an explanation is given which may be true, it is for the Jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the Jury think that the explanation may be reasonably true, the prisoner is entitled to an acquittal because the Crown has not discharged the onus of proof imposed upon it of satisfying the Jury beyond reasonable doubt of the prisoner's guilt. That onus

never changes; it always rests on the prosecution.

14. The statement of the law contained in the above charge was approved by their Lordships of the Privy Council in *Otto George Gfeller v. The King* AIR 1943 PC 211, Sir George Rankin, who delivered the judgment of their Lordships referred to the above charge and observed as follows:

Their Lordships agree that this correctly states the law applicable to the appellant.

The Jury in this case were not told that the explanation that had been given may be true and it was for the Jury to say on the whole evidence whether the accused is guilty or not, that is to say, if the Jury think that the explanation may reasonably be true, though they are not convinced that it is true, the accused would be entitled to acquittal. It is clear from the charge in this case that the legal position was not correctly appreciated by the learned Sessions Judge. He failed to direct the Jury to consider the explanation in the light of the law as stated above. This failure on the part of the learned Judge has deprived the accused of the substance of a fair trial. This conclusion is reinforced by such omissions in the charge as have important bearing on other ingredients of the offence. The order of conviction, in these circumstances, is liable to reversal and must be set aside.

15. The next question is whether a retrial should be ordered in the circumstances of this case. We have considered the whole of the evidence and considering the unsatisfactory nature and the meagre character of the evidence relating to the identity of the property in question, we feel that no useful purpose would be served by ordering retrial. The appeal is allowed and the accused is acquitted.

Thadani, C.J.

16. I agree.